

STATE OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY
ONE SOUTH STATION
BOSTON, MA 02110

COMPLAINT FILED BY MARK THOMAS,
PURSUANT TO G.L. c. 93, § 108 et seq., WITH
THE DEPARTMENT OF
TELECOMMUNICATIONS AND ENERGY
CLAIMING THAT HIS LONG-DISTANCE AND
LOCAL TOLL EXCHANGE SERVICES WERE
SWITCHED TO AT&T COMMUNICATIONS OF
NEW ENGLAND, INC. WITHOUT
AUTHORIZATION

Docket No. 03-04-11

**MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION
OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC.**

Jeffrey Fialky, Esq.
AT&T Communications of New England, Inc.
99 Bedford Street, 4th Floor
Boston, MA 02111
(617) 574-3148 (voice)
(617) 574-3274 (fax)

July 15, 2003

Introduction

AT&T Communications of New England, Inc. (“AT&T”) hereby moves the Department of Telecommunications and Energy (“DTE”) to reconsider its June 26, 2003, order in the above captioned proceeding. As set forth below, as a matter of law and fact, the Department should have applied the ‘apparent authority’ standard as opposed to the ‘actual authority’ standard in its reasoning, and found that AT&T was reasonable in its belief that the Complainant’s wife had apparent authority, and thus AT&T’s change of service in this proceeding was authorized.

The Complainant in this proceeding, Mr. Mark Thomas (“Complainant”) filed a complaint on April 15, 2003, (“Complaint”) alleging that AT&T had switched his regional toll services without proper authorization.¹ The Complaint arose subsequent to a telephone conversation on October 25, 2002, between AT&T and the Kathleen Thomas, wife of the Complainant, during which AT&T presented Ms. Thomas with the opportunity to switch toll providers. A third-party verification of the telephone conversation was conducted pursuant to M.G.L. c. 93 § 109 (“TPV”).

An evidentiary hearing was held on June 11, 2003, during which the Complainant was present and provided testimony. Ms. Thomas did not attend the hearing, and thus provided no testimony. Multiple exhibits were submitted into the record of the proceeding, including an audio recording of the TPV.

On June 26, 2003, the Department issued its order in favor of the Complainant (“*Order*”), finding that the switch by AT&T of the Complainant’s toll service was unauthorized.

¹ *Order*, at 6.

Specifically, the Department found that the telephone conversation had taken place with Ms. Thomas, rather than the Complainant, and thus “the Company clearly made a change in service that was not authorized by the Complainant as the customer of record.”

More significantly, the Department’s *Order* is predicated upon the mistaken factual finding that Ms. Thomas stated that she was not authorized to make service changes to her husband’s account. To the contrary, the record instead reveals that Ms. Thomas represented to AT&T that she indeed was authorized to make such changes.

For the reasons further set forth below, the Department should reconsider its *Order* as a matter of fact and of law.

Argument

AT&T has historically endeavored to ensure that all changes to a customer’s service account comply with both federal and state ‘slamming’ laws. As well, the Department has treated the nominal alleged instances of unauthorized service changes with the highest degree of fairness to all parties. AT&T files this motion, however, to ensure that any finding of an unauthorized change or service, e.g. ‘slam,’ is correct as a matter of law and fact. As set forth below, the *Order* is incorrect with respect to the fundamental fact of whether Ms. Thomas stated she was authorized to change the Complainant’s service account. Moreover, the *Order* fails to adhere to relevant federal law that controls the ‘authority’ issue as Evaluated by the Department.

In its *Order*, the Department found that in response to a question of whether Ms. Thomas was authorized to change the service account held in her husband’s name, she responded

in the negative.² Thus, the Department found that, notwithstanding Ms. Thomas's consent to the change of service in the TPV, "the switch to AT&T was not authorized regardless of the Complainant's wife's later affirmative responses."³ This finding is not only factually incorrect, but as a matter of law, incorrectly applies an 'actual authority' standard as opposed to the correct standard of 'apparent authority.'

It is not realistic that AT&T, or any other carrier, would be able to appropriately determine with any degree of absolute certainty, the 'actual authority' of an individual to authorize a change in service to the account of the customer of record. As a matter of practicality, spouses, roommates, and significant others hold utility accounts in their names for the benefit of the entire residence. As well, it is not practical that the 'customer'⁴ of record will be available for all service issues. That is to say for instance, that a spouse, for practical convenience, could need to make changes to the services in the name of the other spouse.

Massachusetts law memorializes this practicality. In fact, pursuant to M.G.L. c. 93 § 109(c)(2)(ii), the TPV must confirm "the authority of the person spoken to in order to authorize a change in the primary [interexchange carrier]... for a particular line identified." By creating the provision allowing individuals other than the customer to make service changes, the statute acknowledges that the customer of record may not always be available to make respective

² See *Order*, at 5-7.

³ *Id.*, at 6.

⁴ See M.G.L. c. 93 § 108; "customer" is defined as "a person who resides in the commonwealth and *subscribes* to local or long distance telecommunications services."

service charges. However, Massachusetts law does not require that ‘authority’ be proved to any level of absolute certainty.

Pursuant to applicable federal law, placing the burden of proof upon the carrier to demonstrate the actual authority of the person answering the phone pursuant to a telemarketing call violates 47 U.S.C. § 258. In the recent United States Court of Appeals decision *AT&T Corporation v. Federal Communications Commission*, the Federal Communications Commission (“FCC”) had assessed \$80,000 in forfeiture penalties against AT&T for two slamming incidents. The Court’s analysis examined the FCC’s slamming regulations under 47 C.F.R. § 64.1120(a)(1), and found that the regulations, which required actual-authorization from the subscriber, exceeded the FCC’s scope of authority under 47 U.S.C. § 258(a).⁵ In overturning the FCC’s slamming determination, the Court held that “the [FCC’s] requirement that telecommunications carriers guarantee that the actual line subscriber has authorized the service change order exceeds the [FCC’s] statutory authority to prescribe procedures to verify authorization.”⁶ The Court specifically held that:

“[t]he [FCC’s] actual authorization requirement charges carriers that engage in telemarketing with a virtually impossible task: guaranteeing that the person who answers the telephone is in fact authorized to make changes to that telephone line.”⁷

⁵ 47 U.S.C. § 258(a) provides that a telecommunications carrier may not submit or execute changes in subscribers’ telephone service except in accordance with verification procedures prescribed by the FCC.

⁶ *AT&T Corporation v. Federal Communications Commission*, 323 F.3d 1081,1082 (D.C. Cir. 2003).

⁷ *Id.*, at 1086.

In so reasoning, the Court further noted that long distance carriers often lack access to the local carrier's customer record pertaining to the customer of record.⁸ Moreover, it reasoned:

“[c]arriers have no way of knowing whom subscribers may have authorized to make changes on their behalf. In other words, telecommunications carriers seeking new customers via telemarketing have little choice but to depend on the veracity of the person answering the phone.”⁹

As the Department noted in its *Order*, it has elected to administer the FCC rules pursuant to its *State Notification of Election to Administer FCC Rules*.¹⁰ Notwithstanding this election, the Department is nonetheless bound by the scope of the FCC's authority,¹¹ and may not exceed the scope of 47 U.S.C. § 258 by creating an ‘actual authority’ standard of review.

As the Court reasoned in *AT&T Corporation v. Federal Communications Commission*, AT&T in this matter could not have determined whether Ms. Thomas had actual authority to make changes to her husband's account. Rather, AT&T had to rely on the facts and circumstances which reasonably demonstrated that the Complainant's wife had *apparent* authority to authorize the change in services.

In its *Order*, the Department found that the when the third-party verifier asked Ms. Thomas whether she had the authority to authorize a switch in service for the account in the Complainant's name, the Department found that “[s]he responded in the *negative*, and requested

⁸ *Id.*

⁹ *Id.*

¹⁰ *Order*, at 4.

¹¹ *See* 47 C.F.R. § 64.1110.

the verifier to call back when her husband was home.”¹² This finding is not correct. In fact, the third-party verifier asked Ms. Thomas directly whether she was authorized to make changes to the Complainant’s account, to which she responded in the *affirmative*. Specifically, the question and response was as follows:

Third-party verifier: Are you authorized to make changes to this account?

Ms. Thomas: Yes.

On the basis of Ms. Thomas’s clear answer to the question of her authority, AT&T was reasonable in its belief that Ms. Thomas had authority to authorize the change in service to AT&T.

Indeed, as the record additionally shows, Ms. Thomas had *actual* authority. She was in fact authorized to make changes to the account in her husband’s name. The Complainant specifically testified that he and his wife “have an open communication where decisions are made amongst both of us.”¹³

For these reasons, Ms. Thomas had actual or apparent authority to make changes to the account.

¹² *Order*, at 5.

¹³ D.T.E. 03-04-11, evidentiary hearing held June 11, 2003, hearing transcript (“Tr.”) at 27.

Conclusion

For the reasons set forth above, the Department should reconsider the *Order*, and find that the switch of the Complainant's service by AT&T was authorized in accordance with M.G.L. c. 159 § 109.

Respectfully submitted,

**AT&T COMMUNICATIONS OF
NEW ENGLAND, INC.**

Jeffrey Fialky, Esq.
AT&T Communications of New England,
Inc.
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Boston, MA 02111
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